

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

January 7, 2009

Charles R. Fulbruge III
Clerk

No. 06-40506
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MARTIN MERCADO-GARZA

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:03-CR-590-1

Before DAVIS, GARZA, and PRADO, Circuit Judges.

PER CURIAM:*

Martin Mercado-Garza (Mercado) pleaded guilty to conspiring to possess, with the intent to distribute, more than 100 kilograms of marijuana. He was sentenced to 87 months of imprisonment and a four-year term of supervised release.

Mercado argues that the district court, in determining his sentence, improperly considered prior arrests for which no conviction resulted. He refers this court, however, only to instances where the district court considered his four

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

prior convictions. He does not contest the validity of those convictions. As these arrests culminated in convictions, this argument lacks merit.

Mercado contends that the district court erred in adding two points to his criminal history score, pursuant to U.S.S.G. § 4A1.1(d), based on the fact that, at the time he committed the instant offense, he was on probation for a Washington forgery conviction. He maintains that his probationary period was extended solely due to his failure to pay a fine and that it was therefore improper to use that probationary period to apply § 4A1.1(d).

We have conducted a de novo review of the district court's application of § 4A1.1(d). See *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). We need not address Mercado's argument because the application of § 4A1.1(d) was supported by the fact that, at the time Mercado committed the instant offense, he was on probation following an Oregon kidnapping conviction as he had absconded from supervision on that probation term. Mercado has made no argument with regard to his Oregon kidnapping conviction or the district court's use thereof to apply § 4A1.1(d) in calculating his guidelines sentencing range.

AFFIRMED.